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Attorneys for Gerald T. Raynor

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re
CHARLES THOMAS BROWN, d/b/a
TOM BROWN PREFERRED TRUST
COMPANY,

Debtor.

MAUREEN GAUGHAN, Chapter 7
Trustee,

Plaintiff,

v.

ANN AKAMINE, et al,

Defendants.

FILED
FROM OVERNIGHT BOX
MAR 16 2001

KEVIN E. KEENE
UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

No. 97-14228-PHX-GBN

Chapter 7

Adversary No. 99-00746 - *ECF*

**MOTION TO VACATE JUDGMENT
FOR LACK OF PERSONAL JURISDICTION**

Gerald T. Raynor ("Raynor"), through undersigned counsel, makes this special appearance in this adversary proceeding solely for the purpose of contesting the validity of a Default Judgment entered against Raynor in the above-captioned adversary proceeding. Raynor respectfully requests that the Court vacate the aforementioned Judgment because the Court did not, and has not, obtained personal jurisdiction over Raynor. This Motion is supported by the attached Memorandum of Points and Authorities, as well as the accompanying Affidavits and Exhibits, and the entire record in this

matter, all of which are incorporated herein by this reference.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

The Debtor in this matter filed his petition for relief under Chapter 7 of the Bankruptcy Code on or about October 17, 1997. Nearly two years later, the Trustee initiated the instant adversary proceeding by the filing of her Complaint on or about October 18, 1999. In the Complaint, the Trustee seeks to recover payments made by the Debtor to various investors, alleging that all investors were essentially participants in a ponzi scheme.

On or about November 18, 2000, the Trustee's counsel attempted to obtain service upon Raynor, among others, by mailing a copy of the Summons and Complaint to Raynor via first class mail. The address specified for Raynor in the Trustee's certificate of service is 1301 E. University Drive, Apt. 116, Tempe, Arizona. Raynor has never resided at the aforementioned address (see Affidavit of Gerald Raynor at paragraph 4). Indeed, 1301 E. University Drive is a small strip mall. Apt. 116 is the business premises for Sunny's Pizza. See, Affidavit of Donald G. Stetts.

Prior to this special appearance in the above-captioned adversary proceeding, Raynor has made no appearance whatsoever in either the adversary or administrative cases. Furthermore, other than receipt of correspondence dated February 20, 2001 accompanied by a copy of the Default Judgment, a set of written Interrogatories and Request for Production of Documents, Raynor has had no contact with any individual or entity relative to these bankruptcy proceedings.

II. LEGAL ANALYSIS

Rule 7004(b)(1), Federal Rules of Bankruptcy Procedure, provides that service of a Complaint in an adversary proceeding may be made within the United States by first class mail, postage prepaid, upon an individual other

1 than an infant or incompetent, by mailing a copy of the Summons and
2 Complaint to the individual's dwelling house or usual place of abode or to
3 the place where the individual regularly conducts a business or profession.
4 Service by personal mail in the form prescribed in Rule 7004(b)(1) does not
5 deprive an individual of his rights to procedural due process. *See, In re Park*
6 *Nursing Center, Inc.*, 766 F.2d 261 (6th Cir. 1985). However, a failure to
7 comply with the requirements of 7004(b) regarding service of the Summons
8 and Complaint divests a Court of jurisdiction over the parties not served.
9 *In re Maready*, 108 BR 728 (Bkrtcy. D. Ariz. 1989). Furthermore, any
10 bankruptcy court order or Judgment is void to the extent that it affects rights
11 of parties not properly served. *Id.* *See, Southern Industrial Banning Corp.*,
12 205 B.R. 525, 530-31 (Bkrtcy. E.D. Tenn. 1996).

13 In the instant matter, the requirements for service of process
14 pursuant to Rule 7004(b) have not been observed. The Trustee's own
15 certificate of service via first class mail clearly shows that the Summons and
16 Complaint were mailed to an address that is neither his principal place of
17 residence or abode, nor a place where he regularly conducts his business.
18 Notice of this adversary proceeding was not given to Raynor until he
19 received a copy of the Default Judgment entered against him. The Trustee's
20 counsel was able to obtain a correct mailing address for Raynor to forward
21 the Default Judgment to him simply by searching the Superior Court
22 electronic docket and calling the Defendant's counsel in a Superior Court
23 suit in which Raynor is the Plaintiff. Interestingly, the Trustee's counsel
24 had access to an address for Mr. Raynor's previous residence, 31619 No. 64th
25 St., Cave Creek, Arizona. Raynor has no idea why service by mail was not
26 attempted at the aforementioned address and likewise has no idea as to how
27 the Trustee's counsel arrived at the 1301 E. University Drive address as
28 Raynor's residence or abode as of the date of service of the Complaint.

1 It is not surprising that the Trustee's counsel has had difficulty in
2 generating current mailing addresses for many of the dozens of Defendants
3 in this adversary proceeding. After all, the transactions forming the subject
4 matter of this adversary proceeding were entered into by various Defendants
5 nearly a decade before the filing of the adversary action herein. In Mr.
6 Raynor's case, the transactions complained of by the Trustee date from 1993
7 and 1994. It would be quite reasonable to assume, therefore, that Mr.
8 Raynor's as well as many other Defendants' addresses varied from the
9 addresses contained in documentation received from the Debtor in this case.
10 What is difficult to understand is the apparent lack of diligence in
11 attempting to verify addresses and to generate new addresses for purposes of
12 service of process.

13 Raynor possesses valid defenses to the claims asserted in the Trustee's
14 Complaint. Raynor learned of the Debtor herein and his business from
15 third persons that maintained successful investment accounts with the
16 Debtor. Based upon the representations made by these third parties
17 concerning the performance of their investments with the Debtor, Raynor
18 invested funds with the Debtor as memorialized by four promissory notes.
19 Raynor had no knowledge of facts which would otherwise have put him on
20 inquiring notice. Indeed, as of the date of Mr. Raynor's investments, all
21 investments with the Debtor were performing adequately. On two
22 occasions, the Debtor redeemed the promissory notes from Raynor pursuant
23 to the terms of those notes. Those notes were surrendered upon receipt of
24 payment. Finally, both of these transactions took place more than 90 days
25 prior to the filing of the Complaint herein. Indeed, the redemption of one
26 promissory note by the Debtor from Raynor took place on April 4, 1995, over
27 two years before the filing of the Debtor's Chapter 7 petition and more than
28 four years before the filing of the adversary proceeding herein.

Consequently, the Trustee's claims against Raynor under the Bankruptcy Code with regard to the 1995 redemption are barred by the limitations provided in 11 U.S.C. § 546. Additionally, any claim that the Trustee might make on account of the 1995 redemption under Arizona's fraudulent transfer act is also barred under that Act's four year statute of limitations.

These are but a few of the defenses available to Raynor. Others may exist which have not yet been discovered by counsel who has not even had an opportunity to do a reasonable analysis of the Complaint herein as well as other documents of record in this case.

III. CONCLUSION

On the grounds and for the reasons stated herein, Raynor respectfully requests that the Court enter its Order vacating the Default Judgment entered against him as being void for lack of personal jurisdiction.

Dated this 16th day of March, 2001.

AYERS & BROWN, P.C.

By: Joseph M. Hillegas, Jr.
Attorneys for Gerald T. Raynor

COPY of the foregoing mailed this 16 day of March, 2001, to:

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Mary J. McMillan